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Attorneys for Defendant Banca MB S.p.A.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AXION POWER INTERNATIONAL, INC., :  
WILLIAM AND TRACY AHEARN, h/w,  
SALLY FONNER, and JAMES SMITH, M.D., :

Plaintiffs, : 07-CV-11493 (RWS)

-against- : DECLARATION OF  
DONALD D. LEWIS

MERCATUS & PARTNERS, LTD., CARI MASI :  
a/k/a CARY MASI, STEPHEN CEVOLO,  
BANCA MB S.p.A., and DWIGHT PARSCALE, :  
IN FURTHER SUPPORT OF  
MOTION TO DISMISS THE  
AMENDED COMPLAINT

Defendants. :  
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DONALD D. LEWIS, pursuant to 28 U.S.C. § 1746, declares under penalties of  
perjury as follows:

I am a member of the Bar of this Court and an associate of the law firm of  
Skadden, Arps, Slate, Meagher & Flom LLP, counsel for Defendant Banca MB S.p.A. I submit  
this Declaration in Further Support of Defendant Banca MB S.p.A.'s Motion to Dismiss the

Amended Complaint, and to place before the Court a true and correct copy of the following documents:

Exhibit

1. Caption page for the action Bootie Beer Corp. v. Mercatus & Partners Ltd., 06-CV-5893 (S.D.N.Y.)
2. Caption page for the action Nite Capital, L.P. v. Mercatus & Partners Ltd., 603296/06 (Supreme Court of the State of New York, County of New York)

Dated: August 28, 2008  
New York, New York



Donald D. Lewis

## **EXHIBIT 1**

Michael J. Ference, Esq. (MF-7600)  
 David J. Cohn, Esq. (DC-4520)  
 SICHENZIA ROSS FRIEDMAN FERENCE LLP  
 1065 Avenue of the Americas, 21<sup>st</sup> Floor  
 New York, New York 10018  
 (212) 930-9700



UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

-----x  
 BOOTIE BEER CORPORATION, :  
 Plaintiff, :  
 - against - :  
 MERCATUS & PARTNERS, LIMITED, :  
 Defendant. :  
 -----x

Judge Berman  
**06 CV 5983**  
 Index No.:

**COMPLAINT**

Jury Trial Requested.

Plaintiff Bootie Beer Corporation ("Plaintiff"), by and through its counsel, Sichenzia Ross Friedman Ference LLP, as and for its Complaint against Defendant Mercatus & Partners, Limited ("Defendant"), hereby alleges as follows:

**Summary of Action**

1. On or about December 29, 2005, Plaintiff entered into a Securities Purchase Agreement (the "SPA") with Defendant, whereby in exchange for ten million (10,000,000) shares of Plaintiff's restricted common stock, Defendant contracted to provide funding to Plaintiff in the amount of \$3,375,000 to be paid within thirty (30) days of receipt of Plaintiff's shares. On January 9, 2006, Plaintiff provided Defendant with two (2) stock certificates for five million (5,000,000) shares each, thereby fulfilling its obligation under the SPA.

2. Defendant breached the SPA by failing to provide Plaintiff with the agreed-to funds. Despite repeated requests by Plaintiff and repeated assurances from Defendant and the

## **EXHIBIT 2**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

NITE CAPITAL, L.P., a Delaware limited partnership,	)	Index No.:	
	)		0 6 0 0 3 2 9 6
Plaintiff,	)		
	)		
-against-	)		
MERCATUS & PARTNERS LIMITED, a United Kingdom Private Limited Company, and BROWN BROTHERS HARRIMAN & CO., a New York domestic limited partnership,	)		<b>VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</b>
Defendants.	)		

Plaintiff Nite Capital, Inc. ("Nite Capital"), by its attorneys, Siller Wilk LLP, as and for its Verified Complaint against defendants Mercatus & Partners Limited ("Mercatus") and Brown Brothers Harriman & Co. ("BBH"), alleges as follows:

Overview

1. Plaintiff Nite Capital, an investment fund, seeks the return of its shares of stock of Earth Biofuels, Inc., which are incredibly valuable, and to which all parties admit it is entitled. Mercatus entered into an agreement with Nite Capital to buy the shares, but never paid for them, and also failed to return them to Nite Capital, as required under their stock purchase agreement. Despite Mercatus's admission, in writing, that it is obligated to return all of the shares, it has failed to return 422,412 shares of the stock to Nite Capital. Nite Capital can wait no longer: the delay is endangering transactions that Nite Capital would pursue on behalf of its investors, and, with a limited market, the value of the shares has dropped substantially since the time Mercatus was required to return these shares. Nite Capital must have its shares back immediately to prevent further irreparable harm that it will continue to suffer if the shares are not returned to it.